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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. FELIX M. RODRIGUEZ, Defendant and Appellant.	B206320 (Los Angeles County Super. Ct. No. KA079047)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed.

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, and David F. Glassman, Deputy Attorneys `General, for Plaintiff and Respondent.

On appeal following his conviction for second degree murder, Felix M. Rodriguez contends the evidence demonstrated he killed Daniel Contreras, his 19-year-old stepson, in the heat of passion after he learned Contreras had inappropriate sexual contact with Rodriguez's children and thus at most supports a conviction for voluntary manslaughter. Rodriguez also contends the prosecutor committed misconduct during closing argument. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Charges*

Rodriguez was charged by information with one count of murder (Pen. Code, § 187, subd. (a)).[1] The information specially alleged Rodriguez had used a deadly weapon (knife) within the meaning of section 12022, subdivision (b)(1), and further alleged he had suffered two prior serious or violent felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and two prior serious felony conviction within the meaning of section 667, subdivision (a)(1). Rodriguez pleaded not guilty and denied the special allegations.

2. *Summary of the Evidence Presented at Trial*

a. *Rodriguez learns of Contreras's inappropriate sexual contact with Rodriguez's children*

Rodriguez testified in his own defense and provided much of the background of his actions culminating in the fatal stabbing of his stepson.

Rodriguez, who was born in Delaware, met his wife, Debbie Rodriguez,[2] in 1995 in California. Debbie's son, Contreras, was eight years old at the time. Rodriguez had a good relationship with Contreras; he taught him how to play sports, took him to the park and helped him with his homework.

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1 Statutory references are to the Penal Code.

2 Rodriguez is also identified in the record as Feliciano Mauricio Rodriguez. Because he and Debbie Rodriguez share the same last name, we refer to Debbie by her first name for convenience and clarity. (See *Cruz v. Superior Court* (2004) 120 Cal.App.4th 175, 188, fn. 13.)

Rodriguez and Debbie had a daughter, J.R, and a son, F.R. In 1998 Rodriguez, Debbie, J.R., F.R. and Contreras moved to Delaware. Debbie and Rodriguez had a second son, E.R.

In mid-2006 Debbie moved back to California with J.R. and E.R. Contreras, who by then was in college, and F.R. stayed with Rodriguez in Delaware. However, Rodriguez soon decided also to move to California to keep the family together. In late January 2007 Rodriguez began the cross-country drive in a rented truck with Contreras following in a car. For the first few days, F.R. spent time in both the vehicles.

Rodriguez testified he had noticed for about a week before the move that Contreras seemed paranoid—he stopped leaving the house, going to work or going to school and thought Rodriguez or nine-year-old F.R. might hurt him. Contreras's behavior persisted during the drive to California. Rodriguez's attempts to have Contreras explain his fears were unsuccessful. Finally, Contreras told Rodriguez—after Rodriguez's repeated assurances he would never hurt Contreras—that he had "molested" J.R., F.R. and the baby, E.R. (Although F.R told Rodriguez he did not recall being molested, Rodriguez did not believe him.) After Rodriguez called Debbie and told her about the conversation, Debbie instructed Rodriguez to continue driving to California where they would get it straightened out.

As soon as they arrived in Pomona on February 5, 2007, Debbie took Contreras, who was still acting nervous and paranoid, to a mental health hospital. The hospital's assessment and referral specialist, Chelsea Austin, described Contreras as psychotic, paranoid, delusional, suicidal and possibly responding to auditory hallucinations. Contreras told Austin he felt guilty because he had molested his half siblings and, although vague, reported five incidents during which he inappropriately touched them and instructed them to touch him. Austin diagnosed Contreras as suffering from major depressive disorder with psychotic features and admitted him to the hospital, where he remained for 10 days. (A hospital psychiatrist later diagnosed Contreras as psychotic, with auditory hallucinations, and suicidal.) Austin also notified the Los Angeles County

Department of Children and Family Services (DCFS) that Contreras may have abused the children.

The day after Contreras was admitted to the hospital, a law enforcement officer told Debbie and Rodriguez that Contreras was not permitted contact with the children. Subsequently, Debbie and Rodriguez talked with a DCFS social worker, who informed them Contreras could not live in the same house with the children or be left alone with them. (The social worker could not recall whether she told the family that Contreras could not have any contact whatsoever with the children.) Rodriguez, Debbie, J.R., F.R. and E.R. had moved into the home of Susan Mindiola, Debbie's sister, where some of Mindiola's children also lived. According to Mindiola, Contreras stayed with one of her and Debbie's other sisters after he was released from the hospital. However, Mindiola also explained Contreras had spent the night at her home on about five occasions when J.R., F.R. and E.R. were there.

In April 2007 Rodriguez visited his daughter from a previous marriage, C.R. After telling C.R. what was happening with Contreras, C.R. told Rodriguez that, one morning while she was visiting him in Delaware in 2002 when she was 11 years old, she awoke to find Contreras had put his penis near her face. She also told Rodriguez Contreras had pulled down her bathing suit bottom while they were in a lake or a pool when she was about seven years old.

On May 7, 2007 Rodriguez asked J.R. whether anyone had ever snuck into her room or tried to get on top of her after the family's return to California. She said no, but said Contreras had come into her room and covered her mouth when they lived in Delaware. Rodriguez did not ask J.R. any more questions; he explained he did not want to know additional information.

b. *Rodriguez kills Contreras*

Rodriguez and Felipe Ledesma, Jr. had plans to go fishing on May 8, 2007. In preparation for the trip Ledesma had purchased food, as well as a knife to filet fish they might catch, which he put in a cooler that morning. The men's plans changed, however;

and they went to Mindiola's house instead to do some repairs. Ledesma did not bring the cooler into Mindiola's house.

Mindiola and her daughter Katherine Sauceda were home when Rodriguez and Ledesma arrived during the afternoon. Rodriguez asked Ledesma to fix a curtain rod on the second floor. After telling Mindiola he was going to shampoo the carpet on the first floor, Rodriguez gave her five dollars and told her to pick up her children from school and buy them ice cream because he wanted all of them out of the house long enough for the carpet to dry. Mindiola agreed to do so.

Mindiola discovered Rodriguez's truck was blocking her car and returned to the house to get his keys. After moving the truck and bringing back the keys, Mindiola noticed the curtains in the front living room had been closed. Sauceda, who had followed Mindiola into the garage, testified she felt as if Rodriguez was trying to rush Mindiola out of the house. Like Mindiola, Sauceda testified the curtains in the front living room had been closed sometime after Rodriguez arrived at the house. While Mindiola was moving Rodriguez's truck, Sauceda saw him watching Mindiola through the door that separated the front living room and the garage. As Mindiola left the house after returning Rodriguez's keys, Sauceda saw Contreras come downstairs and go into the living room in the back of the house. The door to the house then closed, and Sauceda heard it lock. Within seconds Sauceda heard Contreras yelling. She pried the door open with a paint scrapper and discovered Rodriguez standing over Contreras.

Ledesma, who had been upstairs dealing with the window repair, testified he saw Contreras go downstairs. Several minutes later he heard Contreras exclaim, "Felix, why are you doing this to me?" Ledesma went downstairs and found Rodriguez on top of Contreras, stabbing him with a knife. Ledesma tried to push Rodriguez off, but was unable to do so.

For his part, Rodriguez testified he recalls little of what happened during the attack on Contreras. He remembers seeing Contreras, who had been on the second floor of the home, come down the stairs and remembers wrestling with or pushing him. After that, Rodriguez was sitting on the couch with blood everywhere asking himself, "What have I

done?" Although he understood he stabbed Contreras multiple times,[3] Rodriguez explained, "It wasn't me that did that." Rodriguez knew Contreras had slept at Mindiola's home on May 7, 2008 (that is, the night before the stabbing) and spent some weekends there, including some when his children were present. Nonetheless, Rodriguez claimed he did not expect to see Contreras there on May 8, 2008. Rodriguez also testified he did not recall bringing the filet knife, which he had used to stab Contreras, into the house or going to his truck to get it.

3. *The Jury Instructions Regarding Voluntary Manslaughter; the Prosecutor's Explanation of a "Cooling-off Period" During Closing Argument*

The jury was fully instructed on first degree murder, second degree murder and voluntary manslaughter. Specifically with respect to the role of provocation, the jury was instructed: "Provocation may reduce murder from first degree murder to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] The provocation which incites the defendant to homicidal conduct in the heat of passion must be either caused by the victim or be conduct reasonably believed to have been engaged in by the victim. [¶] If you conclude the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also consider the provocation when deciding whether the defendant committed murder or manslaughter." (CALCRIM No. 522.)

The jury was also instructed in connection with voluntary manslaughter as a lesser included offense, "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant kills someone because of sudden quarrel or heat of passion if: [¶] 1. The defendant was provoked; 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average

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3 The Los Angeles County deputy medical examiner who performed Contreras's autopsy testified Contreras had 12 stab wounds.

disposition to act rashly and without due deliberation, that is, from passion rather than from judgment." (CALCRIM No. 570.)

Finally, the jury was instructed concerning the objective or reasonable person element of the heat of passion theory of voluntary manslaughter and the significance of a cooling-off period: "In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation, knowing the same facts. If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis." (CALCRIM No. 570.)

During closing argument the prosecutor attempted to provide an example of provocation that might be sufficient from an objective and subjective viewpoint and also timely enough to reduce murder to manslaughter: "You can understand—if you catch him in the act of molesting your kid, . . . you can understand that, okay. Maybe even if he just told you for the first time and you go off on him, you can understand that. It's not going to excuse it legally, but you can understand it. Okay. We have a significant cooling-off period here. We have a period of three months. I think from February 5th or 6th, when he first learned, and he believed—he believed all three of his kids had been molested. Okay? And we have over three months. We have three months and two or three days before he actually does it. That's a significant cooling-off period. A couple of hours, maybe even 30 minutes might even be enough of a cooling-off period. But there's a lot more than that. We don't just have a couple of minutes. We don't even have a couple of days. We don't even have a couple of weeks. We have a couple of months, okay, cooling-off period. I'm sure the defense is going to get up and say, well, there were other things that ended up triggering it like, you know, [C.R.] and the revelation the day before, and that just restoked the fires, so to speak. But consider that, the cooling off-period."

4. *The Jury's Verdict and Sentencing*

The jury found Rodriguez guilty of second degree murder and found true the special allegation he had used a deadly weapon. In a bifurcated proceeding the trial court found true the special allegations Rodriguez had suffered two prior strike convictions, but dismissed one of the serious felony convictions for sentencing purposes. The court denied Rodriguez's motion to reduce the murder conviction to voluntary manslaughter and his motion for a new trial. The court sentenced Rodriguez to an aggregate state prison term of 36 years to life: an indeterminate term of 15 years to life doubled to 30 years to life for second degree murder plus one year for the deadly weapon enhancement and five years for the prior serious felony conviction.

DISCUSSION

1. *Governing Law and Standard of Review*

"Manslaughter, a lesser included offense of murder, is an unlawful killing without malice." (*People v. Cruz* (2008) 44 Cal.4th 636, 664; see § 192.) "A defendant lacks malice and is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense"—the unreasonable but good faith belief in having to act in self-defense [citation].'" (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

"'An intentional, unlawful homicide is "upon a sudden quarrel or heat of passion" (§ 192[, subd.] (a)), and is thus voluntary manslaughter (*ibid.*), if the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than judgment.'"' [Citation.] No specific type of provocation is required, and 'the passion aroused need not be anger or rage, but can be any """[v]iolent, intense, high-wrought or enthusiastic emotion""" [citations] other than revenge [citation].' (*Ibid.*) Thus, a person who *intentionally* kills as a result of provocation, that is, 'upon a sudden quarrel or heat of passion,' lacks malice

and is guilty not of murder but of the lesser offense of voluntary manslaughter." (*People v. Lasko*, *supra*, 23 Cal.4th at p. 108.)

"[P]rovocation can arise as a result of a series of events over time . . . ." (*People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1245.) However, whether arising immediately or as a result of a series of events, "'if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter . . . .'" (*People v. Breverman* (1998) 19 Cal.4th 142, 163; see *People v. Daniels* (1991) 52 Cal.3d 815, 868 ["'if sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter'"]; *Kanawyer*, at p. 1244 [killing must be """suddenly as a response to the provocation, and not belatedly as revenge or punishment"""].)

To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

2. *Substantial Evidence Supports Rodriguez's Conviction for Second Degree Murder*

Rodriguez contends his killing of Contreras is a classic case of voluntary manslaughter—a fatal assault carried out in the heat of passion that simply overtook his rational mind. Rodriguez argues his inability to remember the attack, the number of stab wounds to Contreras and the description of his demeanor during the attack by Ledesma and afterward by Sauceda and the police officers who arrived at the scene are all consistent with an extremely violent, sudden outburst that ended as quickly as it had begun. Rodriguez also argues the evidence considered by the prosecution to support a planned and deliberate attack—for example, Rodriguez asking Mindiola to buy ice cream for her children after picking them up and the closed curtains—all have plausible explanations that are fully consistent with his contention the attack was spontaneous and unplanned.

We have no doubt the jury, if it had fully credited Rodriguez's testimony, could have found him guilty of voluntary manslaughter rather than murder. But the jury was not obligated to accept Rodriguez's version of the events on May 8, 2007. Moreover, even without rejecting Rodriguez's testimony entirely, the evidence supports the jury's implied determination that Rodriguez's attack, even if not premeditated, was not the product of provocation so direct and immediate that an average or reasonable person would have reacted in the same manner as he did. As Rodriguez acknowledged in his motion to reduce the verdict to voluntary manslaughter, there is a "very fine line between second degree murder and voluntary manslaughter." Drawing those fine lines in a case such as this, where facts with suspicious overtones may have equally plausible explanations, is a role best suited to the jury. (See *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1705 ["Generally, it is a question of fact for the jury whether the circumstances were sufficient to arouse the passions of the ordinarily reasonable person. [Citations.] However, where the provocation is so slight or so severe that reasonable jurors could not differ on the issue of adequacy, then the court may resolve the question."].)

To be sure, as Rodriguez argues, the evidence indicates he killed Contreras shortly after hearing from his daughter J.R. that she too may have been molested by Contreras. But there was ample evidence to support a finding, beyond a reasonable doubt, that a reasonable or average person would not have reacted at that point as Rodriguez did. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253 [‘‘‘heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,’ because ‘no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man’’’].) Contreras initially told Rodriguez about the “molestation” in only the vaguest terms four months earlier, a time when Contreras was clearly suffering from mental illness. F.R., who was present when Contreras first made his disclosure, denied he had been molested. Yet Rodriguez did not take any steps at that time to confirm whether Contreras had in fact molested F.R. or J.R. or to determine the extent of Contreras’s inappropriate sexual contact, except to ask Contreras whether there had been any penetration, which he denied.

During the next several months Rodriguez was aware there were occasions when Contreras had spent the night at Mindiola’s while his children were present; Rodriguez allowed that on-going, unmonitored contact to occur notwithstanding his belief Contreras had molested his children. In fact, Rodriguez testified he had seen Contreras pick up his son and would be “kind of mad,” but “wouldn’t know what to do. I talked to Debbie about it. I go outside into the garage, smoke a cigarette. . . . They’re his brother. What could I do?” Although Rodriguez finally asked J.R. on May 7, 2008 in general terms whether anyone had ever sexually assaulted her after they had moved back to California, he deliberately chose not to inquire further when she said Contreras had come into her room and covered her mouth when they lived in Delaware. On this record, the jury was fully justified in concluding, whatever Rodriguez’s actual, subjective state of mind when he killed Contreras, a person of average disposition would not have responded to the sight of Contreras by stabbing him to death with a fishing knife.

3. *Rodriguez Has Forfeited His Claim of Prosecutorial Misconduct, Which, In Any Event, Is Without Merit*

Rodriguez contends the prosecutor misstated the law in closing argument when he argued that Rodriguez might have been justifiably provoked only if he had killed Contreras after catching him in the act of molesting his children or within, at most, a few hours of first learning about the molestation. Rodriguez, however, did not object to the prosecutor's argument until he moved to reduce the jury's verdict from second degree murder to voluntary manslaughter. This was too late.

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution only when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'"'" (*People v. Navarette* (2003) 30 Cal.4th 458, 506; accord, *People v. Morales* (2001) 25 Cal.4th 34, 44.)

Generally, to preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety unless an objection or request for admonition would have been futile or an admonition would not have cured the harm. (*People v. Young* (2005) 34 Cal.4th 1149, 1188; *People v. McDermott* (2002) 28 Cal.4th 946, 1001.) Here, Rodriguez's failure to object to the argument until after the jury had rendered its verdict or to request an admonition deprived the trial court of the opportunity to cure any prejudice that may have resulted from a misstatement of the law. This was not a case in which objecting and requesting an admonition would have been futile. Accordingly, Rodriguez's claim of prosecutorial misconduct is forfeited.

Even if not forfeited, Rodriguez's argument is without merit. The prosecutor did not, as Rodriguez contends, argue the provocation must occur immediately before the

homicide. The prosecutor simply identified a range within which the jury might reasonably find provocation to be sufficiently timely to justify reducing murder to voluntary manslaughter—from catching a defendant in the act of molestation to within a few hours of learning about it—and contrasted it with the many months that had passed since Rodriguez first learned Contreras had some form of inappropriate sexual contact with his children. This argument was well within the bounds of permissible advocacy.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.